

**MEMORANDUM**

TO: Carrie Rainey, RLA, AICP  
City Planner, Neighborhood Development Services

CC: Bo Carrington, Seven Development  
Justin Shimp, Shimp Engineering

FROM: Valerie W. Long

DATE: December 7, 2022

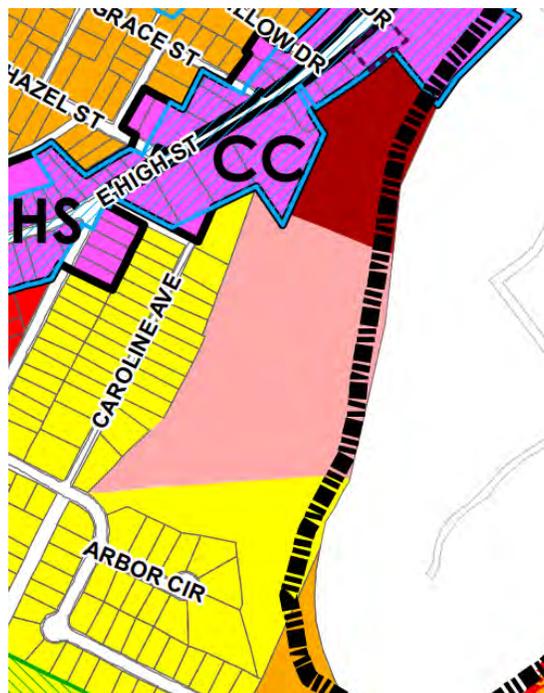
RE: 0 E. High Street Preliminary Site Plan - Zoning Interpretation Issues

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The purpose of this memo is to specifically address certain comments in your October 26, 2022 comment letter to Shimp Engineering in connection with the preliminary site plan application for the 0 E. High Street project (the “Staff Comment Letter”). For the reasons stated herein, we contend that the updated preliminary site plan application dated December 7, 2022 (the “Site Plan Application”) complies with all applicable provisions of the zoning ordinance.

**I. General Property Information**

A. **Current Zoning.** The Property is identified as tax map parcel 500144000, contains approximately 19.91 acres, and according to the official City Zoning Map dated April 6, 2009, is split zoned between several zoning districts: B-1 Business (“B-1”), B-3 Business (B-3”), R-1(S) Small Lot Residential (“R-1S”), and CC Central City Corridor Mixed Use District (“CC”), as shown on the map below (the “Property”).



- B. **Property History.** The Property has been in its current configuration with frontage on both Caroline Avenue and East High Street since December 21, 1964. The configuration and boundaries of most of the parcel are also shown on a 1991 plat attached to a Deed dated May 14, 1992, recorded at Deed Book 580, page 376 in the City's land records. According to other City records, the current Zoning Ordinance was effective on September 15, 2003, the associated official Zoning District Map was adopted September 15, 2003, and readopted April 6, 2009.
- C. **Property Uses.** The Property contains a retail/commercial use in the B-3 portion of the Property for the Rivanna River Company, which commercial use is accessed from East High Street through the portion of the Property zoned CC. The property is subject to a perpetual easement to the City of Charlottesville for the Rivanna River Trail adjacent to the Rivanna River on the eastern side of the Property. The remaining areas of the Property are vacant and open.
- D. **Project Proposal:** The Site Plan Application proposes up to 245 multifamily residential units on the Property, as shown in more detail on the updated Site Plan Application and related materials (the "Project").

## II. Discussion

### A. The Zoning Ordinance Provisions Cited in Comment #15 Are Not Applicable

Comment #15 of your Staff Comment Letter states: "*Please note: No access through areas zoned R-1S Small Lot Residential District, per Section 34-420, and CC Central City Mixed Use District, per Section 34-796, is permitted for multi-family or mixed-use developments.*" For the reasons stated below, we contend these provisions are not applicable.

#### 1. The Cited Provisions only Apply to Non-Residential Uses

Both the Residential Use Matrix in Section 34-420 of the Zoning Ordinance, and the Mixed-Use Matrix in Section 34-796 include several headings or categories of uses, including "Residential and Related Uses," "Non-Residential: General and Misc. Commercial," "Non-Residential Use: Retail," and "Non-Residential: Industrial." Under each of those headings or categories are specific types of primary uses within each category. The particular primary use referenced in comment #15, "Access to adjacent multifamily, commercial, industrial or mixed-use development or use," is located within the category of "Non-Residential: General and Misc. Commercial." Other primary uses within that category of the Use Matrix clearly fall within the category of "Non-Residential: General and Misc. Commercial," such as Amusement Centers, Health Clinics, Data Centers, Offices, and Restaurants, among many others. All of the primary uses within this category are in fact non-residential uses of a general or miscellaneous commercial nature. By contrast, no residential uses are contained within the category of "Non-Residential: General or Misc. Commercial." Given that the proposed primary use of the Property, multifamily residential is a Residential use, as confirmed by Section 34-350(c), and not a Non-Residential Use, the cited provisions of the Use Matrixes are not applicable to the 0 E. High Street site plan application.

#### 2. The "Use" in the Cited Provisions Refers to a Primary Use

Regardless of which category of the Use Matrix the use "Access to adjacent multifamily, commercial, industrial or mixed-use development or use" is located, that "use" is a primary use; where the primary use of a single parcel is to provide access to an adjacent non-residential use. However, the primary use of the Property is multifamily residential. For this reason, as well, the cited provisions are not applicable to the Site Plan Application.

#### 3. The Primary Multifamily Residential Use is Not "Adjacent"

Similarly, given that the Property includes the portions with frontage on both Caroline Street and High Street, the proposed multifamily use is not "adjacent," or on a separate parcel, it is all on the

same parcel that comprises the Property. So, again, it is not a separate use, and for this reason as well, the cited provisions of the Use Matrixes are not applicable to the Site Plan Application.

4. Multi-family residential is a by-right use in the CC District

Given that multifamily residential is a by-right use in the CC district, and that the Property has frontage on E. High Street such that the proposed multifamily use is not “adjacent” and thus not a separate primary use, the cited provision of the Use Matrix for the Mixed Use Corridor districts is inapplicable to the Site Plan Application.

5. Access is Defined to Include Pedestrian Access

The definition of Access in the Zoning Ordinance includes access for both vehicular and pedestrian access:

**Access** means and refers to the right of pedestrians and vehicles to cross between a public right-of-way and private property.

Interpretation of the cited provisions in the Use Matrixes for Residential and Mixed Use Corridor Districts would prohibit sidewalks connecting the Project to other sidewalks and pedestrian routes, even if the sidewalk is on the same parcel as the primary use. Such an interpretation is inconsistent with sound planning, zoning, and design principles, as well as with the purpose and intent of the zoning ordinance.

6. It is Illogical to Prohibit Access to a Use in a Zoning District that is a By-right Use in the Same Zoning District

Notwithstanding the merits of paragraphs II.A.1-5 herein, it is illogical that the Use Matrix for the Mixed Use corridor districts does not permit, in any of its districts, access to uses that are otherwise permitted by-right in that district. If the interpretation of comment #15 were applied to all Mixed Use districts, it would effectively prohibit all by-right uses in such districts other than single-family residential uses. That is directly contrary to the purpose and intent of the Mixed Use Corridor Districts generally, which is, pursuant to Section 34-540(a), to “encourage mixed-use development within appropriate areas of the city, located along or adjacent to streets or highways found by the city council to be significant routes of access to the city.”

For example: any parcel with frontage on a public street with a driveway or other travelway from the public street to the parcel uses that driveway or travelway for access to the parcel, and to the buildings and uses permitted on that parcel. But if the interpretation of Comment #15 is enforced and applied such that the use of the driveway to access a mixed use building on the same parcel is prohibited in any mixed use district on the grounds that the use of the travelway constitutes “Access to adjacent multifamily, commercial, industrial or mixed-use development or use,” then there would be no way to access the permitted use unless it were through a parcel zoned business or industrial. That would lead to an absurd and illogical outcome.

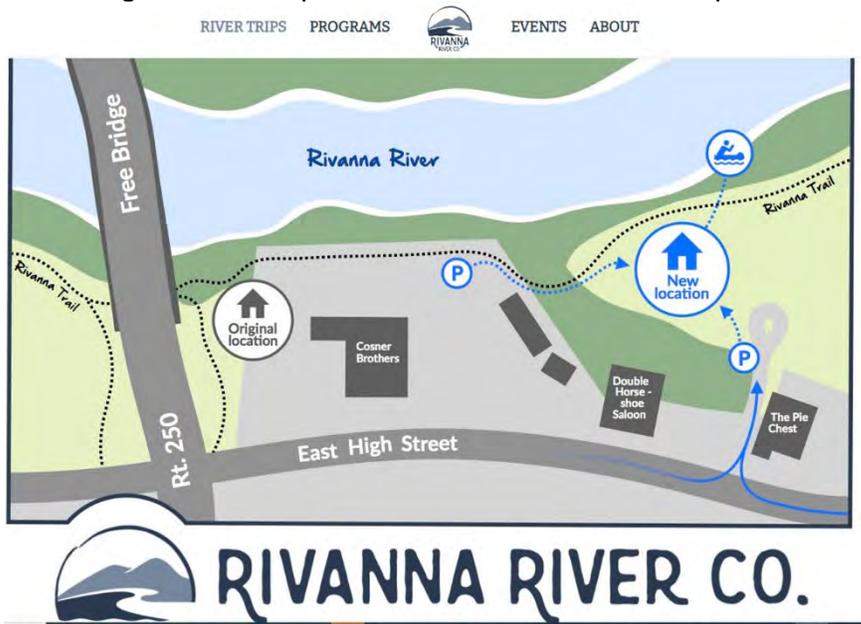
This absurd and illogical outcome is evidence that the interpretation of Comment #15 is incorrect. Furthermore, the fact that such “use” is not permitted in any mixed use district is additional evidence that this interpretation is not correct. We contend that the fact that the “use” identified as “Access to adjacent multifamily, commercial, industrial or mixed-use development or use” is not permitted in any of the Mixed Use Corridor districts, even though many of such uses are by-right uses in those districts, is evidence of an error in the Use Matrix. Regardless, the Use Matrix provision cited in Comment #15 is not applicable to the Site Plan Application.

7. The Cited Provisions of the Use Matrix Have Not Been Interpreted Similarly in Other Projects

The interpretation of the “use” “Access to adjacent multifamily, commercial, industrial or mixed-use development or use” has not been interpreted in other projects in the City as interpreted in Comment #15. We have identified numerous examples of other projects that were approved where

an adjacent parcel was permitted to serve as access to an adjacent multifamily, commercial, or mixed-use development or use. Approval of these other projects is further evidence that the interpretation is inaccurate, and/or that the Use Matrix is erroneous. Examples include the following:

a. **Rivanna River Company.** As cited previously, the Property contains a retail/commercial use in the B-3 portion of the Property for the Rivanna River Company, a commercial use. This commercial use, which is a by-right use in the B-3 district, is accessed from High Street through the portion of the Property zoned CC. Below is a map from the Rivanna River Company's website describing its new and prior locations, both of which require access through land zoned CC.



b. **Dairy Central/Dairy Market.** The Dairy Central project is comprised of three separate parcels, all of which are zoned CC. Parcel 310060002 is a surface parking lot that is used for vehicular and pedestrian access to and parking for parcel 310060000, which includes a variety of restaurants, and parcel 310060001, which contains a mixed-use development comprised of office and residential uses. If the "use" listed on the Use Matrix for the Mixed Use Corridor districts as "Access to adjacent multifamily, commercial, industrial or mixed-use development or use," were interpreted consistent with Comment #15, this project would not have been approved as it is. Parcel 310060002, zoned CC, is used for vehicular access to the non-residential uses on parcel 310060000, and to the mixed use development on parcel 310060001. Even though the commercial and mixed use uses are by-right uses in the CC district, they would not be permitted to be accessed from parcel 310060002 if the Use Matrix were applied consistent with Comment #15. In addition to the absurd and illogical outcome of such an interpretation, such an interpretation would be directly contrary to the concept of interparcel connections, which is an important planning and design principle the City supports and encourages. The following exhibits demonstrate this example:

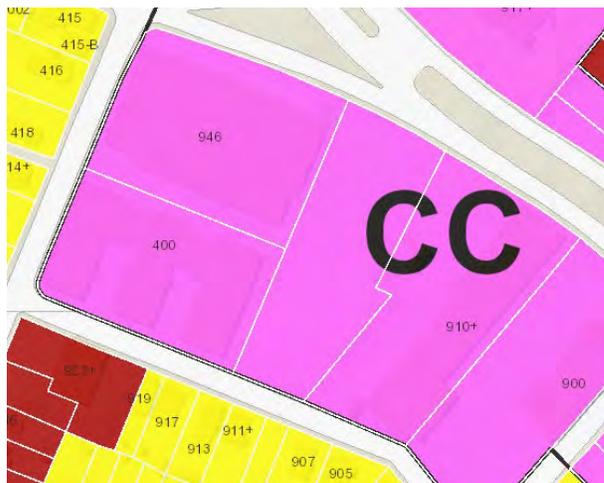
A Google image showing the completed Dairy Central project upon completion (the City's aerial GIS maps are not as current) is below:



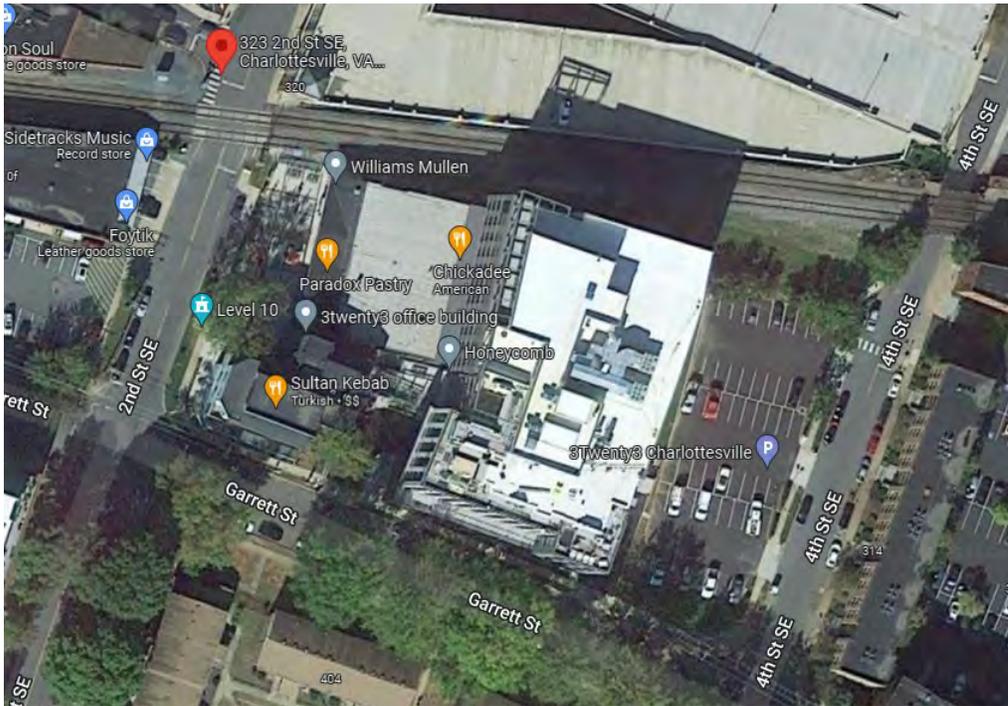
This is the City GIS map showing the three parcels that comprise the Dairy Central Project (the parcels labeled 946 and 400, and the parcel outlined in blue):



All three parcels are zoned CC, as shown below:



c. **3TWENTY3 Building.** The new office building located at 323 2<sup>nd</sup> Street, SE, known as the “3Twenty3 Building” is another example, and is shown below in a Google image (the City GIS aerial images are not current, as construction was just completed in 2020):



And the City GIS maps show the parcel where the 3Twenty3 building is located:



Parcel 280113001 contains the new 3Twenty3 office building (the “3Twenty3 Parcel”) and it and the parcels on either side of it are all zoned Downtown Extended (“DE”), as shown in this image:



The 3Twenty3 building has an address of 323 2<sup>nd</sup> Street, SE even though it does not have parcel frontage on 2<sup>nd</sup> Street. The adjacent parcel to the west is parcel 280113000 and is under separate ownership. Pedestrian access to the 3Twenty3 office building is through parcel 280113000, which access allows the building to have a 2<sup>nd</sup> Street address. All of the uses on both parcels are by-right uses in the DE district. However, if the interpretation of comment #15 were applied to this building, which was just completed in 2020, that pedestrian access would not have been permitted. For pursuant to such interpretation, the primary “use” in the Use Matrix for the Mixed Use Corridor zoning districts of “Access to adjacent multifamily, commercial, industrial or mixed-use development or use,” would not permit pedestrian access through that DE zoned parcel 280113000 to the adjacent commercial use. Not only is that an unreasonable interpretation, it is also directly contrary to the concepts of interparcel connections and pedestrian connections that the City strongly supports, and that was implemented so effectively at the 3Twenty3 building site.



Similarly, the parcel to the east of the 3Twenty3 building parcel is parcel 280113B00, which is also under separate ownership. When the 3Twenty3 building was constructed, it built a small concrete sidewalk across a narrow grass strip connecting the building to a surface parking lot on parcel 280113B00 to facilitate safe and convenient pedestrian access between the two parcels, as shown in the image below (red circle).



This is especially important since there is a pedestrian and vehicular access to the parking garage of the 3Twenty3 building adjacent to the common boundary between those parcels (just to the left of the red circle), and there is a drop in grade between the two parcels (the grass strip slopes down toward the adjacent surface lot). Therefore, pedestrians walking from the garage entrance on the east side of the 3Twenty3 building who then want to walk through the surface parking lot on parcel 280113B00 to access parcels to the east (such as shops, restaurants, and the amphitheater on the eastern end of the downtown mall) may do so safely even during inclement weather. Similarly, they can (and do) use the sidewalk segment when returning to the 3Twenty3 office building from the mall or other areas to the east. It is a small, yet critical piece of pedestrian infrastructure that supports pedestrian safety, pedestrian interconnectivity, and economic development. However, if the interpretation of comment #15 of the Staff Comment Letter were strictly applied, such pedestrian access would not be permitted, since it would constitute “Access to adjacent multifamily, commercial, industrial or mixed-use development or use,” since it constitutes access through a DE zoned parcel to access an adjacent commercial office building.

**d. The Gleason Building & 126 Garrett St. Building.** Parcel 280111A00 has an address of 126 Garrett Street, and contains a number of retail/commercial uses in a single-story building (“126 Garrett St”). Adjacent to the 126 Garrett St. building and parcel is a large mixed-use building containing multifamily residential units and non-residential office and commercial uses, commonly known as the “Gleason Building.” The Gleason Building is a condominium, located on a single parcel, but with multiple individual addresses for the condominium units. Both parcels are shown in the aerial images below from the City’s GIS mapping system, the Gleason Building parcel is indicated by the label “200+” and 126 Garrett St. parcel is labeled “126+.”



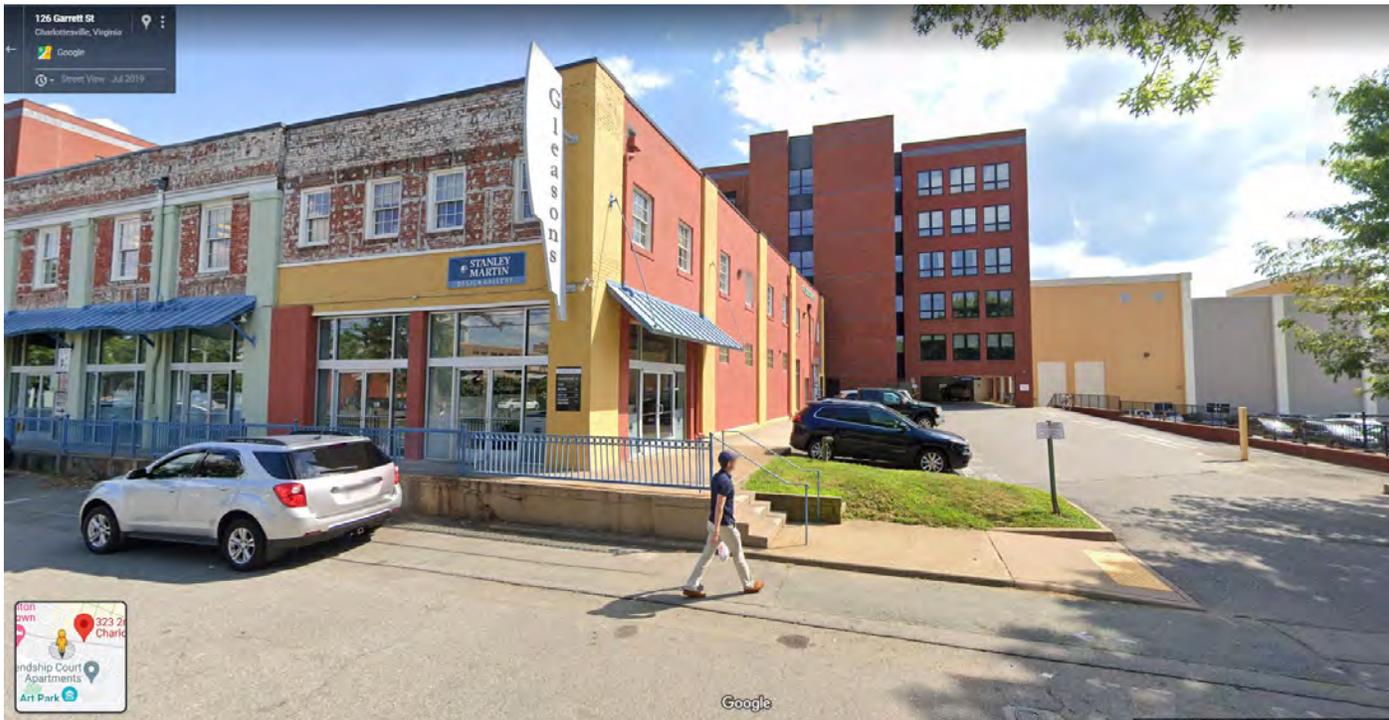
As noted in the image immediately below, the 126 Garrett building is physically separated from the Gleason building, and located on a separate, adjacent parcel.

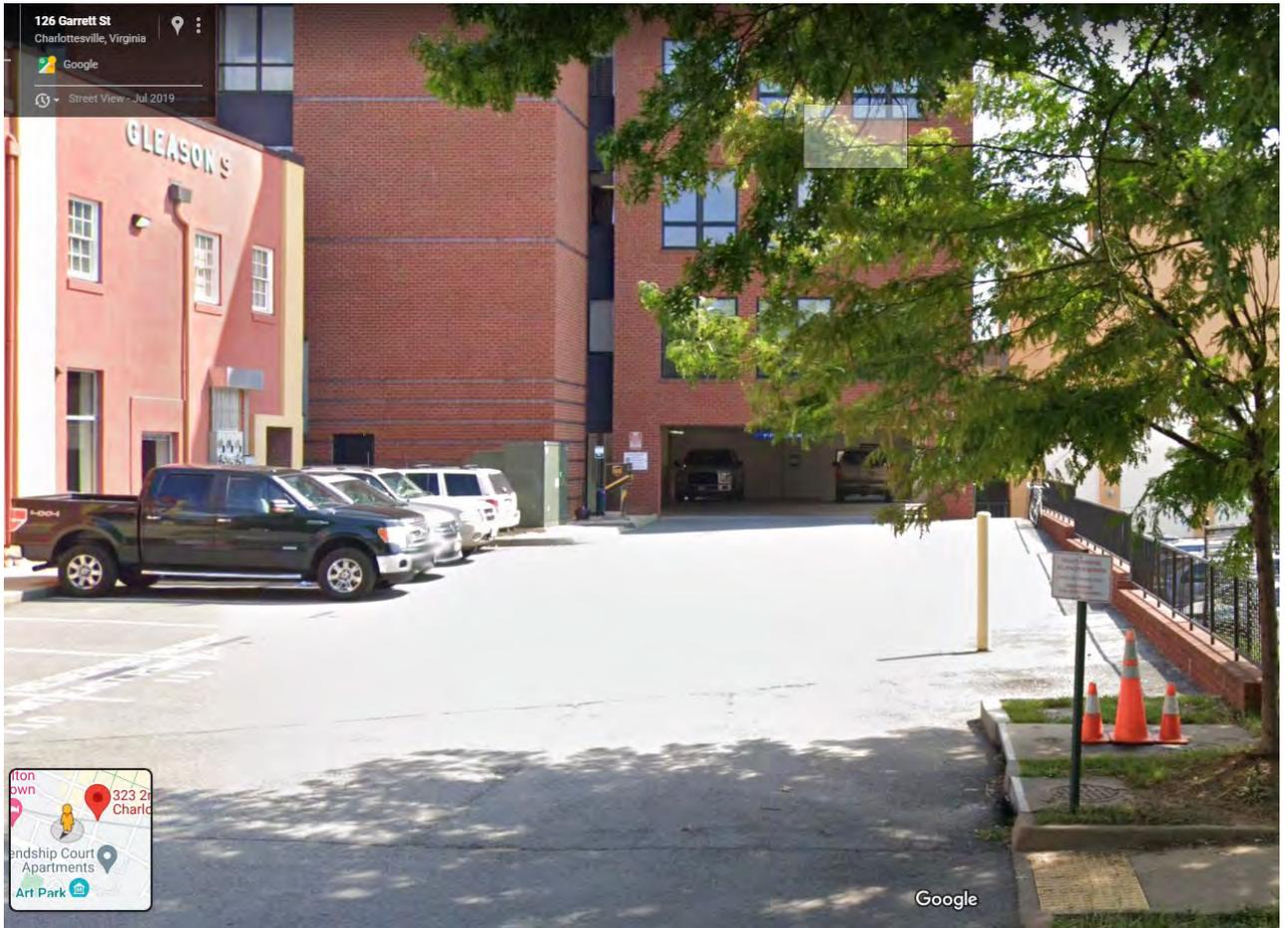


Both parcels are zoned Downtown Extended, as shown below:

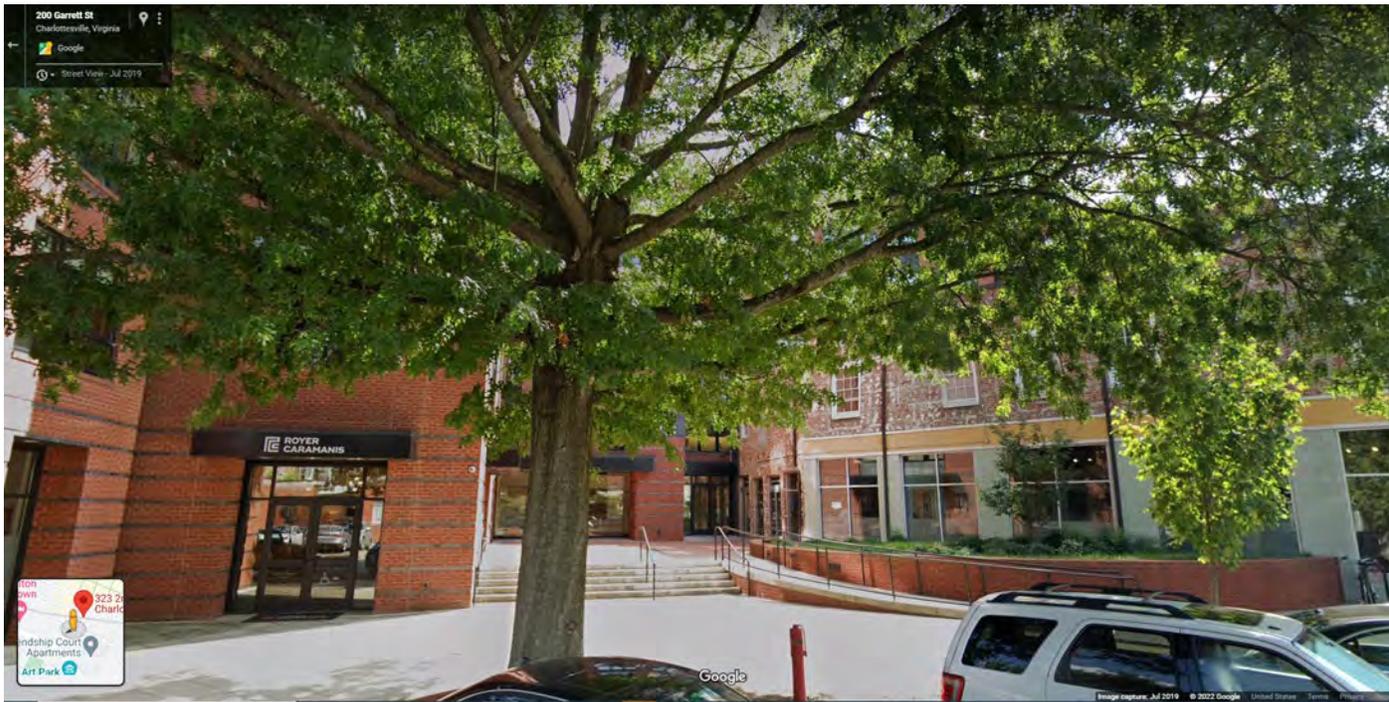
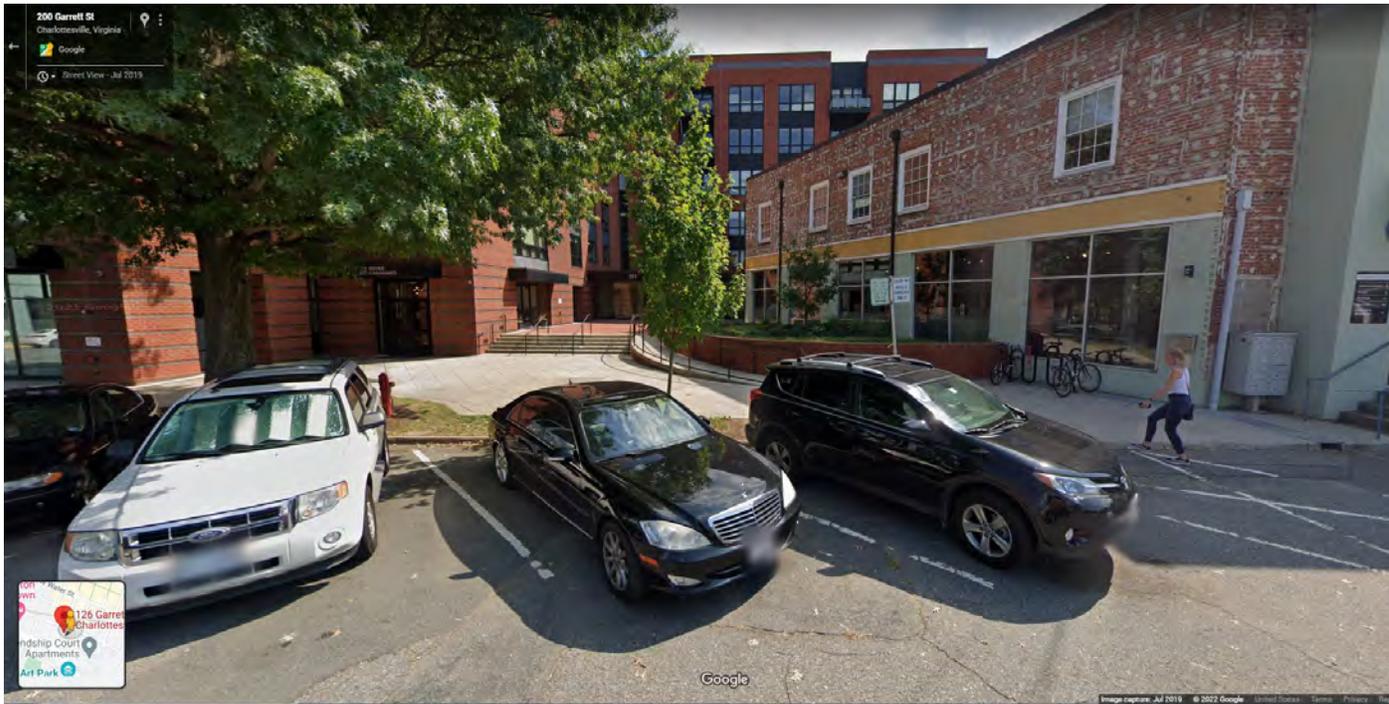


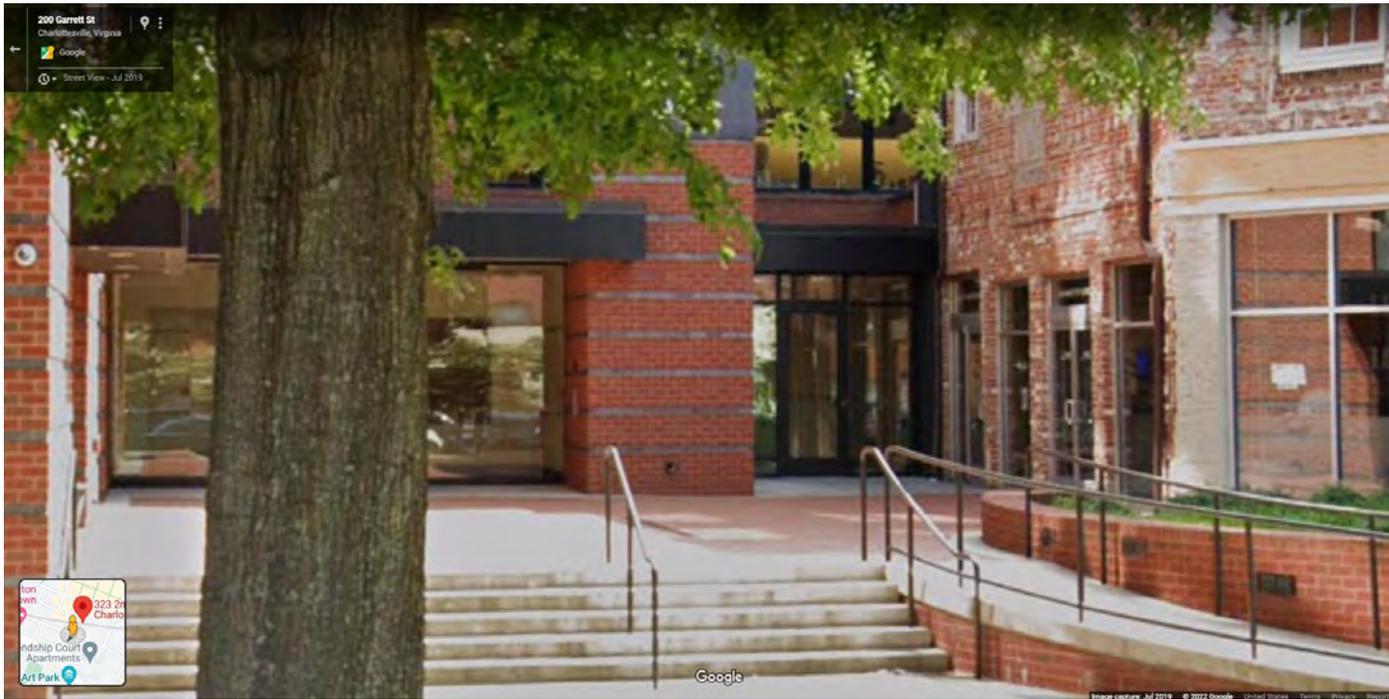
Notably, vehicular access to the Gleason building's parking garage is provided through the 126 Garrett Street parcel, as shown in the images below. However, if the interpretation of comment #15 of the Staff Comment Letter were strictly applied, such vehicular access to the Gleason mixed use building would not be permitted through the adjacent DE zoned 126 Garrett St. parcel, since it would constitute "Access to adjacent multifamily, commercial, industrial or mixed-use development or use.





Similarly, pedestrian access is provided to the 126 Garrett St. building through the adjacent Gleason Building parcel, as shown in the images below:





However, if the interpretation of comment #15 of the Staff Comment Letter were applied, such pedestrian access to the commercial uses on the 126 Garrett St. parcel through the adjacent DE zoned Gleason Building parcel would not be permitted, since it would constitute “Access to adjacent multifamily, commercial, industrial or mixed-use development or use.”

As you know, these examples of vehicular and pedestrian interconnections are consistent with sound planning and design principles for a redeveloping City like Charlottesville, and highly encouraged by Neighborhood Development Services. Even though all uses on both parcels are permitted by-right in the DE district, given that the Gleason building is a mixed-use use and is located on a separate, adjacent parcel, application of comment #15 consistent with the Staff Comment Letter would prohibit such “Access to adjacent multifamily, commercial, industrial or mixed-use development or use” since that “use” is prohibited in all mixed-use districts, including the DE district, pursuant to the Use Matrix. Clearly that interpretation is not only inconsistent with sound planning, zoning, and design principles, but would be an unreasonable interpretation of the Zoning Ordinance. The fact that both of these two types of access were permitted to “adjacent commercial or mixed use developments” through DE zoned parcels, despite the interpretation of the Zoning Ordinance reflected in comment #15, is evidence that such interpretation is not correct.

These are just four examples where the City recently approved access through a mixed use zoning district to a commercial or mixed use development or use, contrary to the interpretation reflected in comment #15. By approving each of these projects, the City has already determined that such a non-residential use is not deemed “Access to adjacent multifamily, commercial, industrial or mixed-use development or use,” otherwise it would not have permitted the projects that incorporate vehicular and pedestrian access to such uses. Each of these examples are evidence that the “use” in the Use Matrixes for the Residential and Mixed Use Corridor zoning districts have (1) not been applied or enforced consistently with the interpretation of Comment #15; and (2) are an illogical interpretation of the Zoning Ordinance. As such, we contend that it is clear that the Site Plan Application complies with the Zoning Ordinance in all respects.

## **B. Residential Accessory Uses are Permitted By-Right in the R-1S and CC Districts**

Even if the travelway for the primary multifamily use is deemed an accessory use of the primary residential use, that use is permitted by right in both the R-1S and CC zoning districts.

In the Use Matrix for Residential zoning districts, under the category of “Residential and Related Uses,” the specific use “Accessory buildings, structures, and uses” is permitted by-right in the R-1S district. Similarly, in the Use Matrix for the Mixed Use Corridor zoning districts, under the category of “Residential and Related Uses,” the specific use “Accessory buildings, structures, and uses (residential)” is allowed by-right in the CC zoning district.

The Zoning Ordinance defines “Accessory buildings, structures, and uses” as follows:

*Accessory building, structure or use* means a building, structure or use located upon the same lot as the principal use, building, or structure, the use of which is incidental to the use of the principal structure. Garages, carports and storage sheds are common residential accessory buildings and structures. Heating, electrical and mechanical equipment, utility service lines and meters, solar energy systems, and related equipment, are equipment or fixtures used accessory to a building or structure located on the same lot.

The travelway is located upon the same lot as the principle use, building or structure, and the use as a travelway is incidental to the use of the principle structure, as well as the principle use.<sup>1</sup> Therefore it is a residential accessory use, and is permitted by-right in both the R-1S and the CC portions of the Property.

## **C. No Multifamily Uses are Located in the R-1S Portions of the Property**

Consistent with comments #34 and #38 of the Staff Comment Letter, no multifamily uses are located in the R-1S residential zone portion of the parcel, including buildings, parking areas, and amenity spaces. All buildings, parking areas, amenity spaces, and other multifamily uses are located on the B-1 and B-3 portions of the Property.

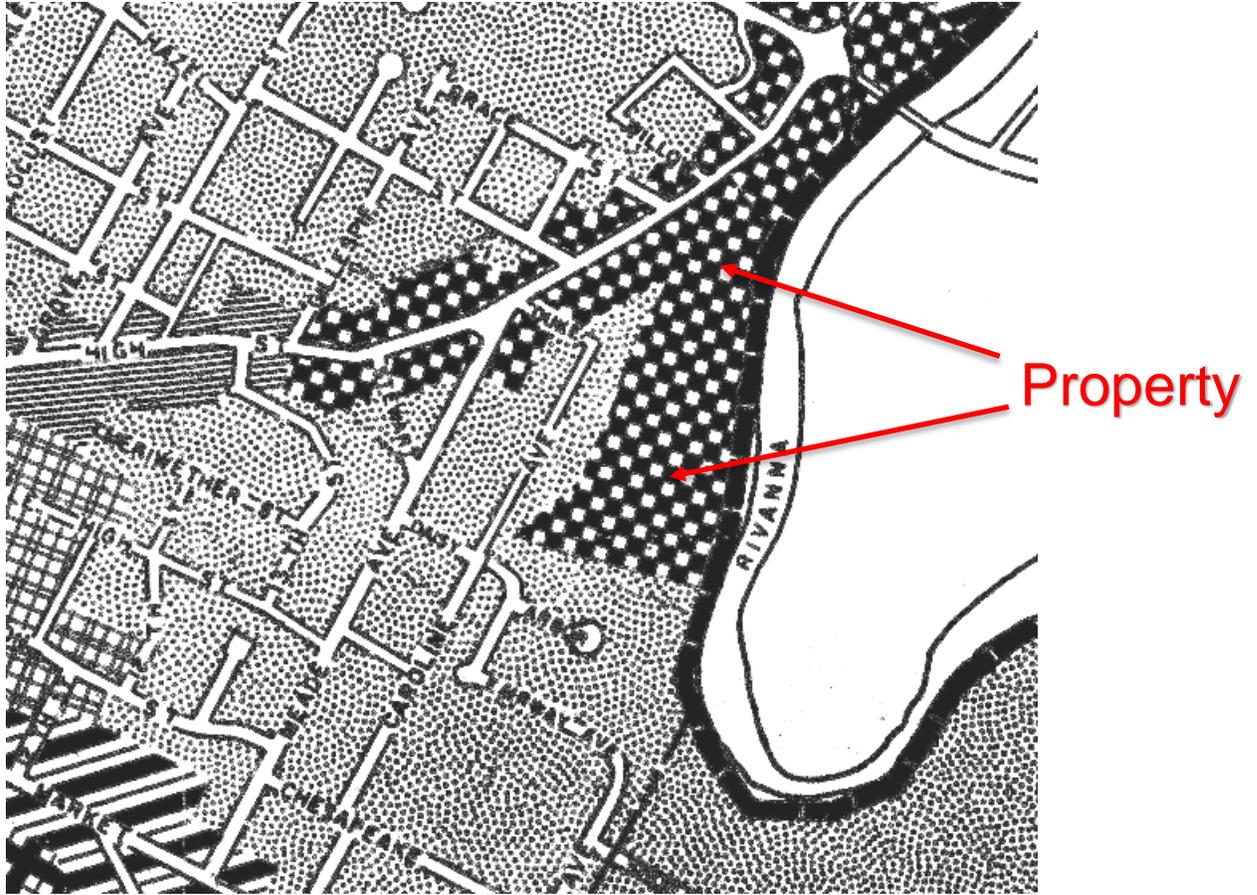
## **D. The Interpretation of Comment #15 is Inconsistent with the Property’s Zoning Over Nearly 60 Years**

The Property has been in its current configuration since December 21, 1964, including with frontage located on Caroline Avenue and East High Street. The Property has also been zoned Business and Residential since at least 1963, as shown on the City Zoning Map insets below.

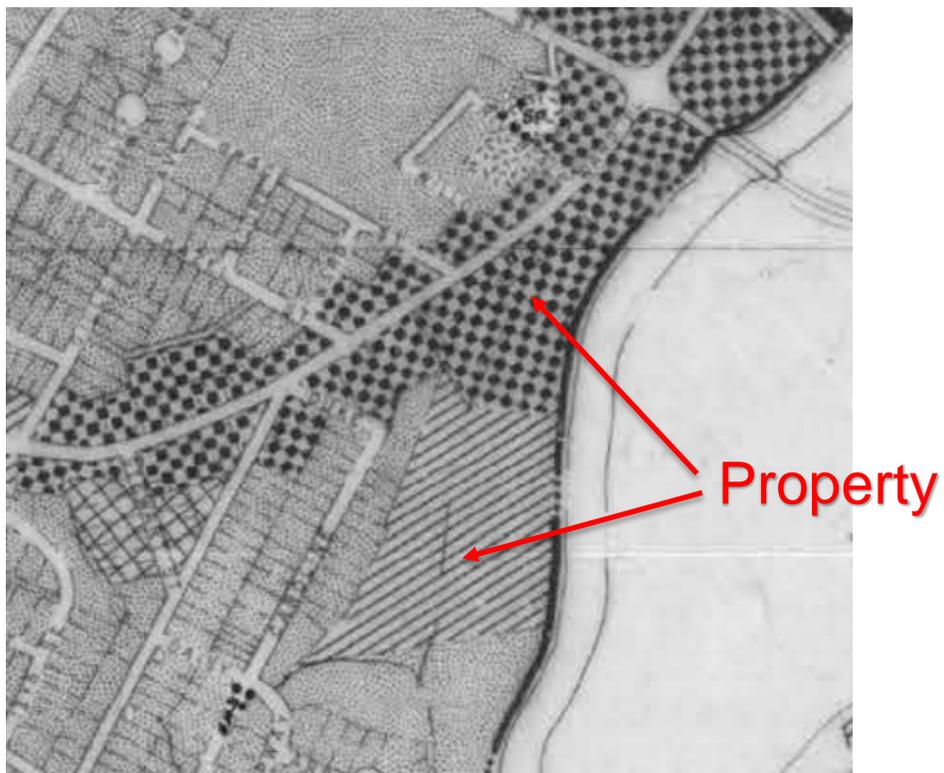
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<sup>1</sup> The definition of “Accessory building, structure or use” applies to all three elements -- buildings, structures, and uses. However, the second clause of the first sentence of the definition appears to inadvertently leave out two of the elements by not including the words “building” and “use,” which logically are implied. The clause reads: “...the use of which is incidental to the use of the principal structure.” But it would be more logical to read “...the use of which is incidental to the use of the principal building, structure, or use.” This is not material to this memorandum, since our position prevails either way, but it is noted for information.

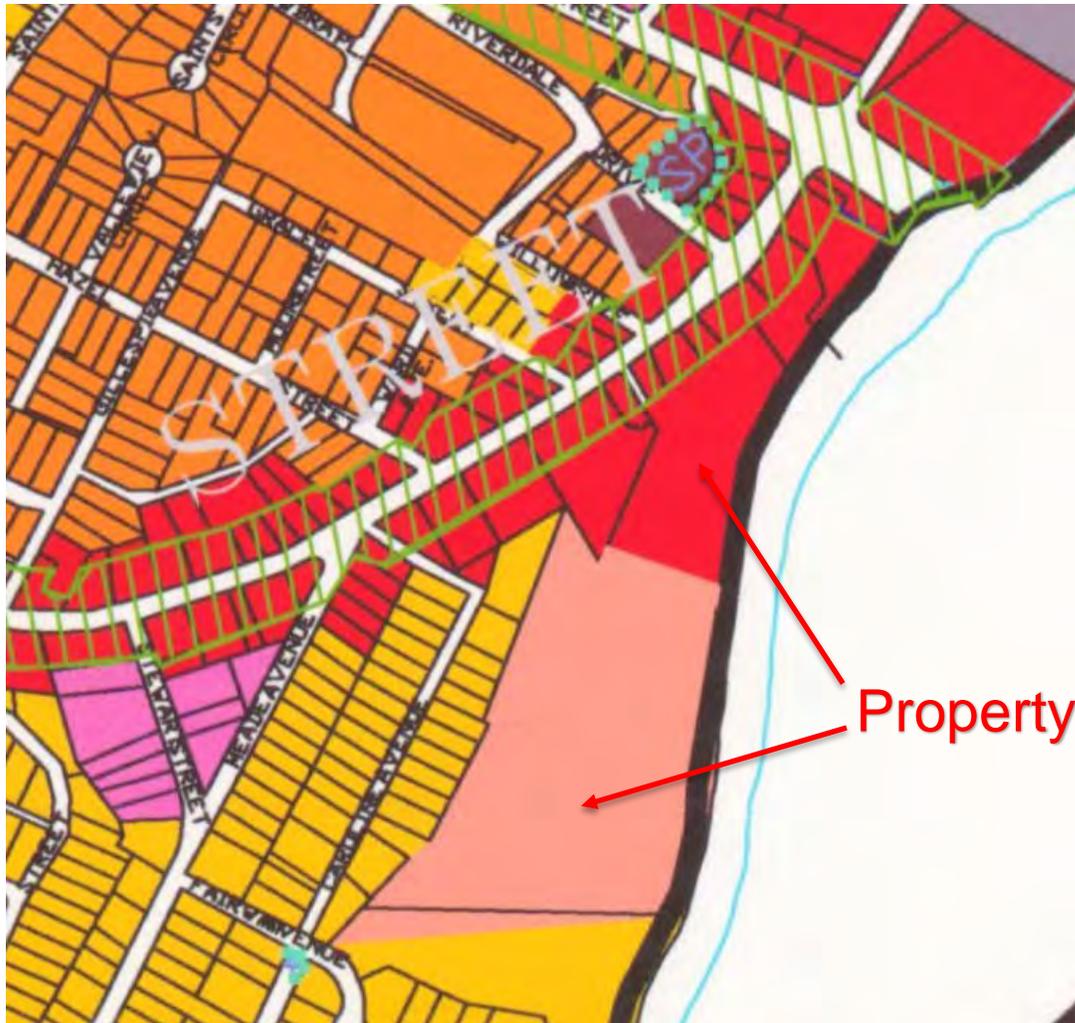
City Zoning Map: 1963



City Zoning Map: 1976



## City Zoning Map: 1991



The City rezoned portions of the Property in 2003, with readoption in 2009, to the existing zoning districts as shown on the official Zoning District Map. The City also adopted the Zoning Ordinance in 2003 with the current Use Matrixes for both Residential and Mixed Use Corridor zoning districts. Because the Property was in the same configuration with frontage on both Caroline Avenue and East High Street at the time the mixed use zoning districts were created in 2003, the Use Matrixes for both Residential and Mixed Use Corridor districts were incorporated into the zoning ordinance, the portion of the Property fronting on E. High Street was rezoned to CC from B-3, and the portion of the Property fronting on Caroline Avenue was rezoned to R-1S from R-1A, the City could not have intended to apply the ordinance as interpreted in comment #15, for that would effectively prohibit any uses permitted by right in the B-1 and B-3 districts on the Property, even though the vast majority of the Property were zoned either B-1 or B-3. It had to be that the access restrictions were limited to separate parcels that were actually “adjacent” to the subject parcel, and not to portions of the same parcel. In other words, at the time, the City knew that to access the B-1 and B-3 portions of the Property and develop the Property with by-right uses in those districts, that it would require access through the portions of the Property adjacent to Caroline Avenue and East High Street. If it were actually the intention to prohibit multi-family, commercial, or other non-residential uses in the areas zoned B-1 and B-3 by prohibiting access through the areas zoned R-1S and CC, the City would have just rezoned the entire parcel to R-1S. Since such a downzoning of the entire parcel did not occur during either the comprehensive rezoning in 2003, or the rezoning in 2009, it is evidence that the City intended the Property to be developed consistent with the B-1 and B-3

zoning that had been in place since at least 1963, and that access would be provided through the CC and R-1S portions of the Property.

In reviewing the official Zoning District Map, this Property appears to be the only property that contains multiple zoning districts where access would need to be provided through districts that do not permit access to non-residential uses. Therefore, it could not be that this access restriction was intended to apply only to by-right multifamily or commercial development of this one parcel, for that would constitute an impermissible piecemeal downzoning. The only logical conclusion is that this access restriction was intended to prevent future rezonings of all or a portion of parcels to non-residential uses that would require access through R-1 or other single family residential districts. This interpretation, that the access restriction was to apply prospectively to future rezonings, is logical in that it was included in a new zoning ordinance and concurrently with the adoption of a new zoning map. The evidence is clear that the access restrictions were not intended to prevent by-right development of this Property, large portions of which had been zoned B-1, B-2, and B-3 for nearly 40 years at the time the new ordinance and map were adopted in 2003.

This conclusion is supported by the City's very recent approval of the Rivanna River Company's use of the B-3 portion of the Property for its commercial use, that accesses East High Street through the CC zoned portion of the Property. By approving that commercial use in that location and with that access, the City has already determined that such a non-residential use is not deemed "Access to adjacent multifamily, commercial, industrial or mixed-use development or use," otherwise it would not have permitted the Rivanna River Company to operate at that location. Similarly, the proposed multifamily use on the B-1 and B-3 portions of the property (which is a by-right use in both zoning districts), should be treated the same, and permitted as shown on the Site Plan Application.

### **III. Conclusion**

For all of the reasons stated herein, we contend that the Site Plan Application complies with all use elements of the Zoning Ordinance.

It is also our opinion that the City erroneously included multifamily residential within the description of the primary "use" of "Access to adjacent multifamily, commercial, industrial or mixed-use development or use," under the category or heading of "Non-Residential: General and Misc. Commercial" in the Use Matrix for both R-1S and CC, given that multifamily residential is a Residential use, and not a Non-Residential Use.

Finally, it has been established that access to a permitted commercial use through the CC zoned portions of the Property is permitted, by the City's approval of the existing non-residential by-right commercial use on the Property within the B-3 zoning district for the Rivanna River Company.

Therefore, for all of these reasons, the Site Plan Application complies with all use regulations and elements of the Zoning Ordinance.